Office-Supreme Court, U.S.
FILED
FEB 24 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 703

SKOKOMISH INDIAN TRIBE, *Petitioner*,

vs.

E. L. FRANCE, Trustee;
CITY OF TACOMA; et al, *Respondents*

BRIEF OF RESPONDENT CITY OF TACOMA OPPOSING PETITION FOR WRIT OF CERTIORARI

MARSHALL MCCORMICK
ROBERT R. HAMILTON
PAUL J. NOLAN
Attorneys for Respondents

345 County-City Building
Tacoma, Washington 98402

LORIMER & LANGLOW, INC., PRINTERS, TACOMA

IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 703

SKOKOMISH INDIAN TRIBE, *Petitioner*,

vs.

E. L. FRANCE, Trustee;
CITY OF TACOMA; et al, *Respondents*

BRIEF OF RESPONDENT CITY OF TACOMA OPPOSING PETITION FOR WRIT OF CERTIORARI

MARSHALL MCCORMICK
ROBERT R. HAMILTON
PAUL J. NOLAN
Attorneys for Respondents
345 County-City Building
Tacoma, Washington 98402

LORIMER - LAYOLOR, INC., PRIN. ERS. TACOMA

INDEX

	Page
Respondent's Counterstatement of the Case	1
Objections to Reason No. 1	5
Objection to Reason No. 2	6
Objection to Reason No. 3	7
Objections to Reason No. 4	7
Objections to the Argument of Petitioner and Counterargument	9

IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 703

SKOKOMISH INDIAN TRIBE, *Petitioner*,

vs.

E. L. FRANCE, Trustee;
CITY OF TACOMA; et al, *Respondents*

BRIEF OF RESPONDENT CITY OF TACOMA OPPOSING PETITION FOR WRIT OF CERTIORARI

RESPONDENT'S COUNTERSTATEMENT OF THE CASE

It appears to the Respondent City of Tacoma, a municipal corporation, that corrections of several discrepancies and omissions in the statement of the case as set forth in the Petitioner's petition would be appropriate and advisable.

The first matter which we would call to the attention of the Court is the misnomer in the heading of the petition wherein the Petitioner is designated as "Skokomish Tribe of Indians." Throughout this entire litigation, commencing with the filing of the Petitioner's

complaint in 1948 through the opinion of the Circuit Court of Appeals for the Ninth Circuit in July of 1963, the Petitioner has been known and designated as "Skokomish Indian Tribe." The record is clear that, in fact, the Petitioner is not a loosely-knit group of individuals belonging to an Indian tribe, as the heading of the Petition would indicate but, rather, it is a corporation duly organized and existing under and pursuant to the laws of the United States under an Act of Congress (48 Stat. 984, as amended by the Act of June 15, 1935, 49 Stat. 378), which fact was recognized by the Court of Appeals in its decision, wherein the Court commenced its opinion as follows:

> "Appellant, an Indian tribe incorporated under an Act of Congress, * * *"

The second erroneous impression that one receives in reading the Petition for Writ of Certiorari on file herein is that the Court is to be concerned with fishing and fishing rights, whereas in fact this issue was not presented to either the District Court or the Court of Appeals, nor was it an issue at all in the proceedings. Here, again, the Court of Appeals recognized succinctly the problem involved wherein it concluded the first sentence in its opinion following the portion set forth above, as follows:

> "* * * *brought this action to establish a claim of title to a strip of tidelands* adjoining its reservation on the Hood's Canal and the Skokomish River in Western Washington * * *" (Emphasis added.)

We emphasize again that the only question before the court is whether or not the Indian tribe *can claim title in fee* to the tidelands abutting the described portion of the original reservation (the uplands having been privately owned for many years, title deraigned from original government patents) when the treaty, executive order, and the use by the Indians of these particular tidelands are all considered.

A reading of this petition would lead one to believe that the deprivation of the particular tidelands abutting the reservation would, in fact, deprive the Indian tribe of valuable fishing rights, particularly with reference to the collection of shellfish. Nothing could be further from the truth as disclosed by the evidence introduced by the trial court and as considered by the Court of Appeals.

The evidence before the trial court indicated clearly that the Skokomish tribe in the early days ranged up and down the canal many miles procuring food, both salmon and shellfish. Indeed, it was established conclusively and convincingly, that the usual locations at which shellfish were procured were miles from the reservation—the Indians traveling to these distant places in canoes. The tideland strip in question was not, nor has it ever been, an abundant source of shellfish for the reason that the emptying of the Skokomish River into the salt waters of Hood's Canal affected the salinity of the tidelands to such an extent that shellfish growth was severely restricted.

This litigation was determined basically upon factual determinations made by the trial court where, in its affirming language, the appellate court stated:

> "* * * After reviewing the record in its entirety, it is our conclusion that the findings are not clearly erroneous, but, on the contrary are amply supported by the evidence.
>
> "The use of the tidelands by the Indian tribe, as disclosed by the evidence, does not support appellant's contention that the tidelands were essential to the Indians' livelihood and that the Indians accordingly must have understood that they were to have the tidelands * * *"

With these three basic impressions corrected and clarified generally, the Respondent City of Tacoma supplies this additional information by way of counter-statement of the case.

The Respondent City of Tacoma owns a portion of the tidelands in question, utilizing the same as a part of the tailrace of a hydroelectric project and a part for the construction of transmission lines from its hydroelectric generating plants on the Skokomish River to the substations located within its corporate boundaries. This hydroelectric generating plant is duly licensed under the laws of the United States, acting by and through the Federal Power Commission, and it received Federal Power Commission approval upon all parts of its installation.

We would seriously dispute the statement made on p. 4 of the Petition under the heading "Statement of

the Case," that the decision of the Court of Appeals has created a serious and real conflict with the long line of cases of this Court. The instant case is clearly distinguishable on its facts alone from all other cases heretofore decided, the distinguishing factual determination being that there was no element of necessity insofar as the ownership of the tidelands in question is concerned.

OBJECTIONS TO REASON NO. 1

The Respondent City of Tacoma disputes Reason No. 1 set forth on pp. 4 and 5 of the Petition. This Respondent will admit that the salt water and the shorelands and tidelands abutting portions of the salt water generally were a source of aboriginal livelihood of the Indians in the early days. However, it does not necessarily follow that each and every inch of tidelands and shorelands constituted a source of aboriginal livelihood. The evidence in this case clearly supported the finding of the trial court that the specific tidelands in question did not, in fact, amount to a source of livelihood, but on the contrary that because of the salinity of the water as influenced by the large amount of fresh water from the Skokomish River washing the tidelands twice a day, that shellfish were not numerous in the tidelands in question.

The court further found from the testimony (including the experts' relied on by the Petitioner), which was uncontroverted, that the Skokomish Indians, in fact, went many miles away from the reservation in order to collect shellfish. They would travel most of the

summer season, starting near Belfair at one extremity of the Canal and traversing over many months the entire length of Hood's Canal in order to find specific locations. The Petitioner's fears of the scope and magnitude of the decision of the Court of Appeals is greatly magnified. In the last analysis, all that this decision means is that where there is a factual determination that the Indians in early times did not use tidelands abutting their reservation, that the tidelands were not necessary or important in the procuring of their food and sustenance, that such tidelands will not ipso facto become a part of the reservation, merely because they happen to abut a described line of the reservation. How this case can affect situations in other areas is certainly subject to specualtion, and a reversal of the opinion of the Court of Appeals could clearly create as many problems, if not more problems, as an affirmance.

OBJECTION TO REASON NO. 2

The Respondent City of Tacoma takes issue with Reason No. 2 and respectfully submits that the decision of the Circuit Court is not only correct but is consistent with prior decisions of the Ninth Circuit Court of Appeals, and that the distinguishing of prior decisions based upon factual determinations is the proper exercise of judicial discretion. To follow the Petitioner's line of reasoning would be to say that if a plaintiff has recovered in ten law suits, it necessarily follows that, in the interests of consistency, the plaintiff must recover in the eleventh law suit, irrespective of the factual situation.

OBJECTION TO REASON NO. 3

Petitioner, in setting forth Reason No. 3 on p. 6 of his petition, has assumed a finding by the Court which the trial court and the appellate court clearly rejected; that is, that the tidelands were a necessary and imperative adjunct to the aboriginal subsistence.

There is, in the decision of t Court of Appeals, no conflict with the rules of construction which have heretofore been established, nor can there be imputed from its opinion holding that all doubt must be resolved in favor of the state and against the Indian.

As we have repeatedly said, this case primarily involves a question of fact and the Petitioner has not as yet recognized that factual determination.

OBJECTIONS TO REASON NO 4

The language of the Petitioner's Petition contained on p. 7 once again indicates the Petitioner's complete disregard for the evidence and findings of the Court. A reading of the Petition would connotate Indian aboriginal use of these particular tidelands for ninety per cent of their food, with twenty-nine species of fish. We point out, once again, repetitious as it may be, that the area in question was not utilized by the Indians in early days for sustenance nor was it adapted for the propagation and growth of shellfish. We emphasize again that the evidence before the trial court, both the Indians who testified in person and the documentary evidence, clearly established that the Indians in the

early days ranged far from the reservation in order to obtain the shellfish which they desired.

The evidence further indicates that shellfish was not a primary source of food, but merely a delicacy. That their primary food was the salmon, caught either in the Skokomish River itself by a process of nets, or upon the open waters of Hood's Canal utilizing Indian canoes.

The Petitioner would further have the Court believe that fishing rights were involved in this proceeding, when, in fact, such is not the case. This proceeding involved only the question of title to the tidelands in question. It may well be, although not before the Court, that the Indians have the right to fish upon and over the tidelands in question; but such a right does not ripen into a fee title. There was clearly reserved to the Indians the right of fishing at usual and accustomed grounds and stations, and such a right is not inconsistent with the position of the Respondent City of Tacoma but, rather, consistent with its position. Should the Court decree that the only grounds and stations that the Indians could fish would be on the tidelands immediately abutting the reservation, then the Indians' meals consisting of fish and shellfish would be scanty and infrequent indeed.

OBJECTIONS TO THE ARGUMENT OF PETITIONER AND COUNTERARGUMENT

The Respondent can make no better argument in support of its position than to adopt the language found in the opinion of the Court of Appeals, where the Court of Appeals, in distinguishing the prior cases referred to by Petitioner, stated:

> "The distinction between those cases and the instant case is one of fact and readily apparent. Here the trier of facts has found, *upon substantial evidence*, that the tidelands *were not essential* to the livelihood of the Indians at the time of the treaty and the executive order providing for the reservation. It is clear from the record that the reservation was not intended to support these Indians, as was the case in *Alaska Pacific Fisheries v. United States*, or to be 'sufficient for their wants,' as was the expressed intention of the treaty in *United States v. Moore*." (Emphasis added.)

Indeed, the evidence relied on by the Petitioners at the trial Court and considered by the Court of Appeals in its opinion indicated that the clam digging for shellfish started in May at the head of Hood's Canal and continued throughout the summer, the Indians moving from one end of the Canal to the other in order to obtain the shellfish, and that the majority of the sites — indeed, all but an insignificant number of sites identified by Professor Elmendorf in his work—were located, not on tidelands adjacent to the reservation, but at places and locations far removed from the confines of the reservation as established by the treaty and executive order.

An assertion by the Petitioner that the tidelands in question were necessary and an imperative adjunct to the "aboriginal subsistence" does not make it so and, in fact, nothing is further from the truth.

The Respondent submits that the Petitioner has submitted to the Court a petition consisting of rules of construction taken from prior decisions and applied the same to an assumed hypothetical factual situation, which assumed hypothetical situation is contrary to the factual situation before the trial Court, contrary to the record before the Court of Appeals for the Ninth Circuit and contrary to any facts which could be elicited upon a retrial of this cause.

The Respondent City of Tacoma respectfully submits, therefore, that the writ of certiorari should be denied and that the decision of the trial Court as affirmed by the United States Court of Appeals for the Ninth Circuit, based upon solid evidentiary facts, be sustained.

Respectfully submitted,

MARSHALL MCCORMICK
ROBERT R. HAMILTON
PAUL J. NOLAN

Attorneys for Respondents
CITY OF TACOMA